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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ARMANDO AVILA-GONZALEZ, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and BARRETT BUSINESS SERVICES, INC., Respondents.	A126429 (WCAB Case Nos. ADJ 2410586 and OAK 0316079.)

Petitioner Armando Avila-Gonzalez petitions for review of an order by a divided panel of the Workers' Compensation Appeals Board (Board). The Board majority ruled that a workers' compensation administrative law judge (WCJ) erred in concluding there was "good cause" under Labor Code[1] section 5803 to reopen the WCJ's earlier decision as to which permanent disability rating schedule (PDRS) applied to Avila-Gonzalez's injury.

In his original decision, the WCJ ruled that, under section 4660, subdivision (d) (section 4660(d)), as interpreted in *Vera v. Workers' Comp. Appeals Bd.* (2007) 154 Cal.App.4th 996 (*Vera*) (Fourth Dist., Div. One), the PDRS that took effect on January 1, 2005 (the 2005 PDRS) applied. Other appellate decisions, issued after the WCJ's original decision, adopted an interpretation of section 4660(d) that was contrary to the decision in *Vera*. (See *Genlyte Group, LLC v. Workers' Comp. Appeals Bd.* (2008) 158

[1] All statutory references are to the Labor Code unless otherwise specified.

Cal.App.4th 705 (*Genlyte*) (Second Dist., Div. Seven); *Zenith Ins. Co. v. Workers' Comp. Appeals Bd.* (2008) 159 Cal.App.4th 483 (*Zenith*) (Second Dist., Div. Seven).) Based on these decisions, the WCJ concluded that (1) there was good cause to reopen his prior decision under section 5803 based on a change in the law, and (2) the prior rating schedule (the 1997 PDRS) applied. The Board, however, granted reconsideration and held that there was no good cause to reopen the WCJ's original decision.

We conclude that the interpretations of section 4660(d) that were adopted after the WCJ's original decision constitute a change in the law and good cause to reopen the decision. We also conclude that the interpretation of section 4660(d) adopted in the later appellate decisions (*Genlyte* and *Zenith*) should govern the determination of which PDRS applies in this case. We will remand the case to the Board to apply that standard and determine which PDRS applies.

I. THE CONFLICTING INTERPRETATIONS OF SECTION 4660(d)

In 2004, the Legislature passed Senate Bill No. 899, a comprehensive set of revisions to the workers' compensation laws. (Stats. 2004, ch. 34, eff. Apr. 19, 2004.) Among other things, the Legislature amended section 4660, which governs the rating of permanent disabilities. (Stats. 2004, ch. 34, § 32; see § 4660; *id*., Historical and Statutory Notes.) The amendments required the implementation of a revised disability rating schedule to replace the then-existing rating system (the 1997 PDRS). (§ 4660, subds. (a)-(e); *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (2007) 146 Cal.App.4th 1311, 1313.) The revised PDRS (the 2005 PDRS) became effective on January 1, 2005, supplanting the 1997 PDRS. (Cal. Code Regs., tit. 8, § 9805.) In many instances, the 2005 PDRS reduces the amount of compensation a worker will receive for a permanent disability. (See *Genlyte, supra,* 158 Cal.App.4th at pp. 715-716; *Vera, supra,* 154 Cal.App.4th at p. 1000.)

Section 4660(d) provides that the 2005 PDRS, and any subsequent amendments or revisions, generally apply prospectively; however, the 2005 PDRS also applies to claims arising *before* January 1, 2005 "when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent

disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker."[2] (§ 4660(d).) Accordingly, if, before January 1, 2005, a qualifying treating physician's report or comprehensive medical-legal report was prepared or notice under section 4061 was required, the worker's permanent disability is to be rated using the earlier schedule that was in effect on the date of injury, i.e., the 1997 PDRS. (*Zenith Ins. Co. v. Workers' Comp. Appeals Bd.* (2007) 153 Cal.App.4th 461, 464; *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 148, 152 (*Costco Wholesale Corp*).)

As we discuss further below, the issue in this case is the applicability of the exception for cases in which a treating physician's report "indicating the existence of permanent disability" was prepared before January 1, 2005. In *Vera,* decided in August 2007, the Court of Appeal (Fourth Dist., Div. One) ruled that, to trigger this exception, "the treating physician's report must indicate that the claimant has a ratable disability that has reached permanent and stationary status, and that in enacting [section 4660(d)], the Legislature was using the term 'permanent disability' as another way of referring to the status of having a ratable disability that is 'permanent and stationary.' "[3] (*Vera, supra,* 154 Cal.App.4th at p. 1005.) The *Vera* court reached this conclusion based partly on the interchangeable use of the terms "permanent" and "permanent and stationary" in the

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[2] The full text of section 4660(d) states: "The [2005] schedule shall promote consistency, uniformity, and objectivity. The schedule and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities that result from compensable injuries received or occurring on and after the effective date of the adoption of the schedule, amendment or revision, as the fact may be. For compensable claims arising before January 1, 2005, the schedule as revised pursuant to changes made in legislation enacted during the 2003-04 Regular and Extraordinary Sessions shall apply to the determination of permanent disabilities when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker."

[3] " 'Permanent and stationary status' is the point when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment." (Cal. Code Regs., tit. 8, § 9785.)

applicable administrative regulations. (*Id.* at p. 1007.) The *Vera* court noted that section 10152 of title 8 of the California Code of Regulations provides, " '[a] disability is considered *permanent* when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment,' " while section 9785 of title 8 uses identical language to define "permanent and stationary." (*Vera, supra,* 154 Cal.App.4th at p. 1007.) The *Vera* court therefore concluded it was appropriate to "presume that the Legislature was aware of the interchangeable use . . . and that it used the term 'permanent disability' as it is defined in the regulations[,]" when it enacted section 4660(d). (*Vera,* at p. 1007.) In support of its conclusion, the *Vera* court also noted that, under the applicable regulatory scheme, a treating physician normally issues a report evaluating the extent of an employee's impairment as relevant to the employee's permanent disability rating after, not before, he or she has determined the employee's status is permanent and stationary. (*Id.* at p. 1006.)

In *Genlyte*, decided in January 2008, the Court of Appeal (Second Dist., Div. Seven) rejected the *Vera* court's interpretation of section 4660(d). (*Genlyte, supra,* 158 Cal.App.4th at pp. 719-722.) The *Genlyte* court stated that the Legislature "has repeatedly demonstrated its ability to specify 'permanent and stationary status' when that is what it intends[,]" but did not do so in section 4660(d). (*Genlyte,* at p. 719, citing §§ 4658, subd. (d)(2), 4061, subd. (a)(2).) The *Genlyte* court stated: " 'We are reluctant to conclude that the Legislature's use of different terms, at different times in the statutory scheme, is meaningless.' " (*Genlyte*, at p. 719.) The *Genlyte* court also noted that the exceptions in section 4660(d) are broadly worded and include any comprehensive medical-legal or treating physician's report "indicating the existence of permanent disability"; the statutory language is not limited to the typical final permanent and stationary report described in *Vera*. (*Genlyte,* at p. 719.) Finally, the *Genlyte* court noted that, in workers' compensation jurisprudence, the term "permanent disability" has a historical meaning that differs from the regulatory definition discussed by the *Vera* court. (*Genlyte*, at pp. 719-720.) "Permanent disability is the impairment of earning capacity,

impairment of the normal use of a body member or function or a competitive handicap in the open labor market." (*Id.* at p. 719.) Because a permanent disability may exist before a worker reaches permanent and stationary status, a treating physician's report may indicate the existence of permanent disability without indicating permanent and stationary status. (*Id.* at pp. 719-722.)

Other decisions have followed *Genlyte*. In *Zenith*, also decided in January 2008, the Second District, Division Seven followed its decision in *Genlyte* and held that "the terms 'permanent disability' and 'permanent and stationary' are not interchangeable, and a permanent and stationary status is not required in order for the comprehensive medical-legal or treating physician's report to indicate the existence of permanent disability under section 4660(d)." (*Zenith, supra,* 159 Cal.App.4th at pp. 497-498.) In *Lewis v. Workers' Comp. Appeals Bd.* (2008) 168 Cal.App.4th 696, 700 (*Lewis*), decided in November 2008, the Third District agreed with *Genlyte* and *Zenith* that "an injured worker's condition need not be permanent and stationary for the section 4660(d) comprehensive medical-legal report or treating physician's report to indicate the existence of permanent disability."[4]

The Supreme Court has not resolved the conflict between *Vera* on the one hand, and *Genlyte, Zenith*, and *Lewis* on the other.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Avila-Gonzalez's Injuries and Treatment

On August 2, 2004, Avila-Gonzalez sustained an industrial injury to his right knee, back, and left lower extremity, while employed as a roofer by respondent Barrett

[4] In the *Lewis* case, the Board denied relief to the applicant based solely on *Vera*, which was the only published decision on the issue at the time the Board ruled. (*Lewis, supra,* 168 Cal.App.4th at p. 699.) The Third District Court of Appeal initially denied summarily the applicant's petition for a writ of review. (*Ibid.*) The Supreme Court, in an order that cited *Genlyte* and *Zenith*, granted review and transferred the case back to the Court of Appeal with directions to issue a writ of review. (*Lewis,* at p. 699.) The Court of Appeal then issued a writ of review and rendered its decision agreeing with *Genlyte* and *Zenith*. (*Lewis,* at pp. 699-700.)

Business Services, Inc. (Barrett). Avila-Gonzalez fell from a roof to the ground, catching his right foot in a ladder as he fell.

In 2004, Avila-Gonzalez received treatment from Dr. Scott Taylor. In a report dated August 3, 2004, Dr. Taylor noted decreased range of motion in Avila-Gonzalez's right knee, as well as an inability to bear weight. Based on his examination and his review of X-rays, Dr. Taylor diagnosed a "Right Knee Proximal Tibia Fracture, Intercondylar Region."

In a report dated November 16, 2004, Dr. Taylor stated: "[Avila-Gonzalez's] condition has slowly improved; however, at this point, he has plateaued in improvement of his range of motion. He still has persistent right knee pain." Dr. Taylor also reviewed an MRI taken on August 12, 2004, which showed a fracture of Avila-Gonzalez's knee. Because of the failure of "conservative measures" (including physical therapy and stretching), Dr. Taylor referred Avila-Gonzalez for a second opinion evaluation with Dr. Warren Strudwick for probable knee surgery. Dr. Taylor stated that Avila-Gonzalez "should continue on temporary disability" and return for re-evaluation.

Avila-Gonzalez received temporary total disability benefits until June 2006.

Dr. Robert Steiner, the agreed medical examiner, prepared a comprehensive medical-legal report dated February 12, 2007. Dr. Steiner stated that, as a result of Avila-Gonzalez's injury, "not only did he have a tibial plateau fracture, he also had an avulsion of the insertion of the posterior cruciate ligament, had sprained his back, had contusion of thigh on the right, leg on the right, and had some generalized abrasions and had a trapezius strain." Dr. Steiner described this as a "severe injury[.]" Dr. Steiner reported that Avila-Gonzalez had knee surgery on June 2, 2005. Avila-Gonzalez had not returned to work since his injury. Dr. Steiner stated Avila-Gonzalez was permanent and stationary as of January 31, 2007.

B. Procedural History

In 2007, the WCJ held a trial on the sole issue of whether the 1997 PDRS or the 2005 PDRS applied to the rating of Avila-Gonzalez's permanent disability. In a decision issued on November 5, 2007 (after *Vera* was decided, but before *Genlyte* was decided),

the WCJ ruled that the 2005 PDRS applied. The WCJ concluded that, under *Vera*, the exception permitting application of the 1997 PDRS when a treating physician's report prepared before January 1, 2005 "indicat[es] the existence of permanent disability" did not apply.[5] No medical report issued prior to January 1, 2005 indicated Avila-Gonzalez's condition was permanent and stationary (as is required to trigger the exception under *Vera*), and the WCJ found that Avila-Gonzalez's condition did not become permanent and stationary until 2006.

The WCJ suggested that, if he had not been bound by *Vera*, he would have found that the exception applied. The WCJ noted that several medical reports prepared in 2004 indicated Avila-Gonzalez had sustained a right knee fracture, including Dr. Taylor's August 3, 2004 report, as well as reports by Dr. Strudwick, Dr. Ramon Terrazas, Dr. Pamela Chacko, and Dr. Philip Rich (the radiologist who read the MRI). The WCJ stated his view that the type of fracture diagnosed by Dr. Taylor was a permanent impairment. However, because none of the 2004 reports indicated Avila-Gonzalez's condition was permanent and stationary, the WCJ stated that, "[a]lthough it is unlikely that we have heard the last word on this issue, [footnote omitted] I am compelled to find the 2005 PDRS applicable to the facts herein based upon [*Vera*]."[6]

In October 2008, Avila-Gonzalez moved to reopen the issue of which rating schedule applied, based on a "change in the law" that he alleged had resulted from Court of Appeal decisions subsequent to *Vera* (i.e., *Genlyte* and *Zenith*).

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[5] The WCJ also ruled that the other two exceptions in section 4660(d) were inapplicable. First, the exception for cases in which the employer is required, prior to January 1, 2005, to provide notice under section 4061 (i.e., notice of the employer's position as to whether permanent disability is owing) did not apply; that notice must accompany the *last* payment of temporary disability indemnity, and Avila-Gonzalez received temporary disability benefits until 2006. Second, the exception for cases in which a comprehensive medical-legal report prepared before January 1, 2005 indicates the existence of permanent disability did not apply; Dr. Steiner conducted his comprehensive medical-legal examination and issued his report in 2007. Avila-Gonzalez does not contend that either of these two exceptions applies.

[6] The WCJ noted that *Genlyte* and *Zenith* were scheduled for oral argument in the Court of Appeal in December 2007.

In April 2009, the WCJ issued a new decision, in which he found that: (1) good cause existed, based on *Genlyte* and *Zenith*, to reopen the original decision; and (2) under the newer cases, the 1997 PDRS applied. The WCJ found that Dr. Taylor's statement in his November 16, 2004 report that Avila-Gonzalez's range of motion in his right knee had "plateaued" indicated "a permanent condition." The WCJ concluded that therefore Dr. Taylor's November 2004 report was a report of a treating physician, issued before January 1, 2005, indicating the existence of permanent disability; accordingly, the 1997 PDRS applied. (See § 4660(d).)

Barrett filed a petition for reconsideration with the Board. The WCJ filed a report recommending denial of Barrett's petition.

The Board granted the petition for reconsideration. The Board subsequently issued an Opinion and Decision after Reconsideration, in which the majority of the panel held that there had been no change in the law, and thus there was no good cause to reopen the WCJ's original decision. The Board emphasized that *Vera* had not been overruled and was still citable, and that the Supreme Court had not resolved the conflict between *Vera* on the one hand, and *Genlyte* and *Zenith* on the other. The Board stated that the two lines of authority "[e]ach can be cited for a different result[,]" and that different Board panels have issued decisions following the different lines of authority. The Board stated: "Thus, now there is more law to consider and cite, but there has been no change in the law."

In its opinion, the Board also stated that Dr. Taylor's November 2004 report was "not an indication of permanent disability." The Board noted that, in the November 2004 report, Dr. Taylor recommended a second opinion about probable knee surgery and stated Avila-Gonzalez should continue on temporary disability. The Board stated that Dr. Taylor's "statement that [Avila-Gonzalez] has plateaued 'at this point' cannot be used to boot-strap into a permanent and stationary finding of permanent disability." The Board rescinded the WCJ's April 2009 decision.

Commissioner Brass dissented. He stated that he would affirm the WCJ's April 2009 decision for the reasons stated in the WCJ's report recommending denial of Barrett's petition for reconsideration.

We granted Avila-Gonzalez's petition for review. We directed the parties to submit supplemental briefs addressing whether, if there was good cause to reopen the WCJ's original decision, the *Vera* standard or the *Genlyte/Zenith* standard should govern the determination of which PDRS applies in this case. After the parties filed their supplemental briefs, we permitted the City of Los Angeles (City) to file an amicus brief in support of Barrett.

III. DISCUSSION

A. Standard of Review

Issues of statutory interpretation are questions of law subject to de novo review (*Genlyte, supra,* 158 Cal.App.4th at p. 714; *Vera, supra,* 154 Cal.App.4th at p. 1003; *Boehm & Associates. v. Workers' Comp. Appeals Bd.* (1999) 76 Cal.App.4th 513, 515-516), although the Board's interpretation of the workers' compensation laws is entitled to great weight unless clearly erroneous. (*Zenith, supra,* 159 Cal.App.4th at p. 490; *Vera,* at p. 1003.) Specifically, " '[w]hile the [Board's] determination of what constitutes "good cause" [to reopen a decision under section 5803] may be accorded great weight it is not conclusive. [Citation.]' [Citation.]" (*Nicky Blair's Restaurant v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 941, 956 (*Nicky Blair's*); accord, *Arias v. Workers' Comp. Appeals Bd.* (1983) 146 Cal.App.3d 813, 821.)

To the extent Avila-Gonzalez challenges the Board's factual findings, we review those findings for substantial evidence. (§ 5952, subd. (d).) The Board, on reconsideration of a WCJ's decision, may resolve conflicts in the evidence, make its own credibility determinations, reject the findings of the WCJ and enter its own findings on the basis of its review of the record. (*Smith v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 530, 535 (*Smith*).) However, the Board's decision must be supported by substantial evidence in light of the entire record. (§ 5952, subd. (d); *Lamb v. Workmen's*

Comp. Appeals Bd. (1974) 11 Cal.3d 274, 280-281; *Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901, 908.)

B. Waiver

Avila-Gonzalez contends briefly that Barrett consented to the reopening of the WCJ's original decision based on a change in the law, and thus waived any objection to the reopening. Avila-Gonzalez relies on the minutes of a hearing on December 19, 2008, at which the WCJ stated: "[I]t is on the basis that *Vera* is no longer controlling law and that there has been a change in the law, that [Avila-Gonzalez] requests that I reopen this issue and make a new decision. [Barrett] has no objection to my revisiting the issue."

However, this statement is ambiguous as to whether the WCJ was merely stating that Barrett did not object to the WCJ's consideration of whether there was good cause to reopen, as opposed to stating that Barrett actually agreed to the reopening of the case. Significantly, the WCJ did not treat this issue as one on which the parties had agreed. To the contrary, in the portion of the minutes immediately following the quoted statement, the WCJ stated that the issues remaining to be decided at trial included the question of whether there had been a change in the law permitting the WCJ to reopen his original decision. And, in his opinion explaining his decision to reopen, the WCJ analyzed in detail whether there was good cause to reopen; the WCJ did not state that the issue had been resolved by agreement or stipulation. The record thus does not support a finding that Barrett waived its right to argue that there was no good cause to reopen.

C. Good Cause to Reopen

Under section 5803, the Board has continuing jurisdiction over its orders, decisions and awards. (§ 5803.) If a party files a petition to reopen within five years of the date of the applicant's injury, the Board may "rescind, alter, or amend any order, decision, or award, good cause appearing therefor."[7] (§ 5803; see § 5804.)

[7] Similarly, a WCJ may amend his or her decision (before a petition for reconsideration is filed) "for good cause under the authority and subject to the limitations set out in Sections 5803 and 5804." (Cal. Code Regs., tit. 8, § 10858; *Nestle Ice Cream*

The Supreme Court has explained that the "good cause" required to reopen a decision under section 5803 may arise from a variety of circumstances, including an intervening change in, or clarification of, the law. "The cases construing [section 5803] have recognized that a variety of factors and circumstances may constitute the requisite 'good cause.' . . . [Citations.] *[A] subsequent clarification of the applicable law by a reviewing court which indicates that an employee was originally entitled to a different award than that given is 'good cause' to reopen a case and amend an award*. (*Knowles v. Workmen's Comp. Appeals Bd.* (1970) 10 Cal.App.3d 1027, 1030 [(*Knowles*)] . . . .)" (*LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 241-242 (*LeBoeuf*), italics added; accord, *Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, 926-927 [" ' "Good cause" ' includes a mistake of fact, *a mistake of law disclosed by a subsequent appellate court ruling on the same point in another case*, inadvertence, newly discovered evidence, or fraud"], italics added; *Nicky Blair's*, *supra*, 109 Cal.App.3d at pp. 955-957.) In its decision in this case, the Board noted that "a change in case law or judicial interpretation of a statute may constitute good cause to reopen a decision based on prior law." However, a decision may not be reopened based on "a mere change of *opinion*" by the Board or the WCJ. (*Nicky Blair's*,. at p. 955.)

Avila-Gonzalez argues that the *Genlyte* and *Zenith* courts' rejection of *Vera* was a change in the governing law establishing good cause for the WCJ to reopen his original decision. Avila-Gonzalez relies in part on *Knowles*. In *Knowles*, the employee (Knowles) was a deputy sheriff whose initial claim for cumulative industrial heart injury was denied in 1965. (*Id.* at p. 1029.) Knowles later filed a petition to reopen, arguing that two Court of Appeal decisions issued in 1968 had changed the law and thus constituted good cause to reopen under section 5803. (*Knowles*, at pp. 1029-1030.)

Knowles involved a statute that established a presumption that heart trouble in certain law enforcement personnel was industrially-caused. (*Knowles*, *supra*, 10

Co., LLC v. Workers' Comp. Appeals Bd. (2007) 146 Cal.App.4th 1104, 1108-1109, & fn. 2.)

Cal.App.3d at pp. 1030-1031.) A 1959 amendment to the statutory language created a "question of whether the presumption of industrial causation of a sheriff or deputy sheriff's in-service heart trouble could be rebutted by evidence of preexisting heart disease." (*Ibid.*) In a 1961 decision, *State Comp. Ins. Fund v. Industrial Acc. Com. (Quick)* (1961) 56 Cal.2d 681, the Supreme Court "appeared to resolve the problem" by stating that it was possible to rebut the presumption with evidence of preexisting nonindustrial heart disease. (*Knowles*, at p. 1031, citing *Quick*, at p. 685.) In the 1965 decision in Knowles's case, evidence of Knowles's preexisting nonindustrial heart condition was admitted to rebut the statutory presumption of industrial causation, as *Quick* appeared to permit. (*Knowles*, at p. 1032.) However, in a 1968 decision, *Turner v. Workmen's Comp. App. Bd.* (1968) 258 Cal.App.2d 442, 447-449 (*Turner*), the Court of Appeal held that the statutory presumption generally could *not* be rebutted with evidence of preexisting nonindustrial heart disease. The *Turner* court distinguished the facts in *Quick*, in which the applicant had previously received an award of partial permanent disability based on a prior heart attack; because the applicant's current and previous disabilities overlapped, it was permissible in *Quick* to apportion the current disability award for industrial heart trouble by deducting for preexisting nonindustrial heart disease. (*Turner*, at pp. 447-448; accord, *Bussa v. Workmen's Comp. App. Bd.* (1968) 259 Cal.App.2d 261, 264-265 (*Bussa*) [following *Turner*]; *State Employees' Retirement System v. Workmen's Comp. App. Bd.* (1968) 267 Cal.App.2d 611, 616 [same].)

After examining these decisions, the *Knowles* court concluded that the *Turner* and *Bussa* courts had adopted interpretations of the relevant statute that were "substantially different, if not opposed to, earlier interpretations." (*Knowles, supra*, 10 Cal.App.3d at p. 1033.) Accordingly, the *Knowles* court held that, although the Supreme Court's decision in *Quick* had "never been expressly overruled," the *Turner* and *Bussa* decisions

limiting the application of *Quick* had effected a change in the law that constituted good cause to reopen the original decision in Knowles's case.[8] (*Knowles,* at pp. 1032-1033.)

Similarly, here, the *Genlyte* and *Zenith* courts adopted an interpretation of section 4660(d) that was substantially different from, and opposed to, the interpretation adopted by the *Vera* court. As a result, the *Genlyte* and *Zenith* decisions effected a change in the law governing the determination of whether a qualifying medical report indicates the existence of permanent disability under section 4660(d). In November 2007, when the WCJ issued his original decision, *Vera* was the only published decision addressing this point, and the WCJ was obligated to follow it. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Stewart v. Workers' Comp. Appeals Bd.* (1985) 172 Cal.App.3d 351, 355.) After the *Genlyte* and *Zenith* courts disagreed with *Vera* in January 2008, creating a conflict among the Courts of Appeal, a WCJ or Board panel addressing this question could "make a choice between the conflicting decisions." (*Auto Equity Sales, Inc.*, at p. 456.) As the WCJ noted in explaining his decision to reopen, *Vera* was "controlling law" prior to the issuance of the *Genlyte* decision; after *Genlyte*, "there ceased to be controlling law on the issue . . . ." This development constituted a significant change in the law governing this issue, and it constituted good cause to reopen under section 5803.

The Board concluded, and Barrett argues in its answer, that no change in the law has occurred, because the Supreme Court has not overruled *Vera*, nor has the Fourth District, Division One disavowed its decision in that case; *Vera* is still published and citable authority. However, as the *Knowles* court recognized, subsequent judicial decisions may effect a change in the law without overruling an earlier, contrary decision. (See *Knowles, supra,* 10 Cal.App.3d at pp. 1032-1033.) Here, the case law interpreting

[8] As noted above, the Supreme Court in *LeBoeuf* cited *Knowles* for the proposition that good cause exists when "a subsequent clarification of the applicable law by a reviewing court . . . indicates that an employee was originally entitled to a different award than that given . . . ." (*LeBoeuf, supra,* 34 Cal.3d at pp. 241-242.)

section 4660(d) changed from a binding rule (under *Vera*) to a situation in which a WCJ or Board panel may choose whether to follow *Vera* or *Genlyte*.

Barrett also argues that the change of law described in *Knowles* is different from the situation here, because the *Turner* court "distinguished the case itself from *Quick* on its facts and the issue presented[,]" while the *Genlyte* and *Zenith* courts rejected *Vera*. (See *Turner, supra,* 258 Cal.App.2d at pp. 445-448; *Genlyte, supra,* 158 Cal.App.4th at pp. 719-722; *Zenith, supra,* 159 Cal.App.4th at pp. 497-499.) However, Barrett does not explain why this distinction establishes a meaningful difference between the two circumstances; in both situations, the later decisions adopted statutory interpretations that differed from earlier constructions, although the earlier decisions were not expressly overruled.[9] (See *Knowles, supra,* 10 Cal.App.3d at pp. 1032-1033; *Genlyte,* at pp. 719-722; *Zenith,* at pp. 497-499.)

D. Determining Which PDRS Applies

For the reasons discussed above, there was good cause for the WCJ to reopen his original decision and choose between the conflicting interpretations of section 4660(d) in *Vera* and *Genlyte*. To determine which PDRS applies in this case, it will be necessary to resolve two additional questions: (1) whether the *Vera* standard or the *Genlyte* standard should apply; and (2) whether, under the applicable legal standard, there is a qualifying medical report "indicating the existence of permanent disability."

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[9] Barrett also contends *Knowles* is distinguishable because the *Knowles* court "appear[ed] to rely at least in part on the fact that in the published opinion [*State Employees' Retirement System v. Workmen's Comp. App. Bd.* (1968) 267 Cal.App.2d 611 (Third Dist.) (*State Employees' Retirement System*)], *the Supreme Court* appeared to adopt" the interpretation of the relevant statute announced in *Turner* and *Bussa*. (Italics added.) This is incorrect—the *Knowles* court did refer to the decision in *State Employees' Retirement System*; however, that case was a decision of the Third District Court of Appeal, not the Supreme Court. The *Knowles* court did not suggest that the Supreme Court had adopted the interpretation announced in *Turner* and *Bussa* or had overruled its earlier decision in *Quick*; to the contrary, the *Knowles* court found a change in the law had occurred, despite the fact that *Quick* had *not* been expressly overruled. (See *Knowles, supra,* 10 Cal.App.3d at pp. 1032-1033.)

1. The Applicable Legal Standard

As to the first question, the WCJ, after reopening, applied the *Genlyte* standard. The Board, finding there was no good cause to reopen, did not reach the question of which standard should apply upon reopening. Because the determination of which legal standard should apply is a purely legal question, it is appropriate for this court to decide it before remanding the case.

After examining the *Vera*, *Genlyte* and *Zenith* decisions and considering the arguments presented by the parties in their supplemental briefs, we find the analysis in the *Genlyte* and *Zenith* decisions more persuasive. As noted above, the *Vera* court reached the result it did based partly on the identical definitions of the terms "permanent" and "permanent and stationary" in the applicable regulations. (*Vera, supra,* 154 Cal.App.4th at p. 1007, citing Cal. Code Regs., tit. 8, §§ 9785, subd. (a)(8), 10152.) However, as explained in *Genlyte* and *Zenith,* the terms are not always used interchangeably. (*Genlyte*, *supra*, 158 Cal.App.4th at pp. 719-722; *Zenith, supra,* 159 Cal.App.4th at pp. 497-499.) Case law, in contrast to the regulations, has historically defined permanent disability as the " 'impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market.' " (See *State Compensation Ins. Fund v. Industrial Acc. Com.* (1963) 59 Cal.2d 45, 52; *Luchini v. Workmen's Comp. App. Bd.* (1970) 7 Cal.App.3d 141, 144.) Because permanent disability does not invariably mean permanent and stationary, it is necessary to consider what the Legislature intended.

Here, the language of the exceptions in section 4660(d) weighs against a conclusion that the Legislature meant to require a finding of permanent and stationary status before the exceptions are triggered. As the *Genlyte* court recognized, the Legislature has specified "permanent and stationary status" when that is what it intends. (See §§ 4658, subd. (d)(2) [providing for change in amount of permanent disability indemnity depending on whether employer offers injured employee regular, modified or alternative work "within 60 days of a disability becoming permanent and stationary"], 4061, subd. (a)(2) [specifying required notice upon last payment of temporary disability

indemnity when amount of permanent disability indemnity payable cannot be determined "because the employee's medical condition is not yet permanent and stationary"]; *Genlyte, supra,* 158 Cal.App.4th at p. 719.) We therefore find it significant that, in section 4660(d), the Legislature used the broad phrase "indicating the existence of permanent disability," rather than expressly specifying a requirement of permanent and stationary status. And, the Legislature used broad language encompassing any comprehensive medical-legal report or treating physician's report that includes an indication of permanent disability; the language is not limited to the typical final permanent and stationary report described in *Vera*. (See § 4660(d); *Genlyte,* at p. 719; *Zenith, supra,* 159 Cal.App.4th at p. 497.)

Moreover, the Labor Code and applicable regulations confirm that a permanent disability may, in some circumstances, exist before an employee's injury is permanent and stationary. In section 4061, subdivision (a), the Legislature provided that, when an employer makes the last payment of temporary disability indemnity, it must provide notice that (1) no permanent disability indemnity will be paid because the employer alleges there is no permanent disability, or permanent disability indemnity will be paid in a specified amount that may be contested by the employee, or (2) "*permanent disability indemnity may be or is payable, but that the amount cannot be determined because the employee's medical condition is not yet permanent and stationary*." (§ 4061, subd. (a)(1)-(2), italics added; accord Cal. Code Regs., tit. 8, § 9812, subd. (g)(1) [claims administrator must send notice to employee "[i]f the injury has resulted or may result in *permanent disability* but the employee's medical condition is *not permanent and stationary* . . ."], italics added; see *Genlyte, supra,* 158 Cal.App.4th at pp. 719-722; *Zenith, supra,* 159 Cal.App.4th at pp. 497-499.)

The recognition in section 4061 that permanent disability may occur before permanent and stationary status is significant here, because section 4660(d) specifies that one exception to application of the 2005 PDRS is for cases in which the employer, prior to January 1, 2005, was required to provide notice to the employee under section 4061. (§ 4660(d).) Because section 4061 provides for the sending of notice to an employee

who has a permanent disability but whose condition is not yet permanent and stationary, the section 4061 notice exception under section 4660(d) may be triggered even when an employee's condition is not permanent and stationary prior to January 1, 2005, as long as the employer is required to provide notice under section 4061 prior to that date and as long as the employer predicts that permanent disability benefits will be payable in some amount. This undercuts any conclusion that the Legislature, in drafting section 4660(d), intended permanent and stationary status to be the dividing line between the 1997 PDRS and the 2005 PDRS. If an employer may determine that an employee is permanently disabled but has not yet reached permanent and stationary status (thus triggering the section 4061 notice exception in section 4660(d)), there does not appear to be any reason a physician may not reach a similar conclusion in a qualifying medical report (thus triggering the report exceptions in section 4660(d)).[10]

Case law also recognizes that an employee can be permanently disabled even though his or her condition has not reached permanent and stationary status. For example, in cases involving progressive occupational diseases such as those arising from asbestos exposure, a permanent disability may be rated and advances paid before the employee is permanent and stationary, with jurisdiction reserved pending permanent and stationary status or permanent total disability. (See *General Foundry Service v. Workers' Comp. Appeals Bd.* (1986) 42 Cal.3d 331, 333, 338; *Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473; see *Genlyte*, *supra*, 158 Cal.App.4th at pp. 721-722; *Zenith*, *supra*, 159 Cal.App.4th at pp. 498-499.)

[10] In its amicus brief, City appears to argue this language in section 4061 does not establish permanent disability can occur before permanent and stationary status. City suggests a worker's temporary disability indemnity payments could cease (and thus the notice requirement in section 4061 could arise) if the worker is still partially temporarily disabled (rather than permanently disabled) but has returned to work and thus is experiencing no wage loss. This hypothetical scenario does not persuade us to disregard the clear language of section 4061, which requires an employer to send notice to an employee who has a permanent disability but whose condition is not yet permanent and stationary. (See § 4061, subds. (a)(1)-(2).)

Barrett's arguments in favor of adopting the *Vera* standard are not persuasive. First, Barrett argues that, because the *Vera* court more narrowly construed the section 4660(d) exceptions permitting application of the 1997 PDRS, the *Vera* rule is more consistent with legislative intent. Courts have stated that a legislative goal in enacting SB 899 was to "bring as many cases as possible under the new workers' compensation law[.]" (*Zenith Ins. Co. v. Workers' Comp. Appeals Bd., supra,* 153 Cal.App.4th at p. 465; *Costco Wholesale Corp., supra,* 151 Cal.App.4th at p. 157.) That legislative goal supports avoiding overly broad constructions of the exceptions in section 4660(d). (See *Zenith Ins. Co. v. Workers' Comp. Appeals Bd.,* at pp. 464-465 [rejecting Board interpretation of § 4660(d) that would have interpreted the section 4061 notice exception broadly to apply 1997 PDRS to all cases in which temporary disability payments *began* prior to January 1, 2005, rather than only to those in which temporary disability payments *ended* prior to January 1, 2005]; *Costco Wholesale Corp.,* at p. 157 [same].) However, this general legislative goal does not require adopting the narrower of two proffered constructions of the exceptions in all circumstances, and we conclude that it does not provide a sufficient basis to adopt the *Vera* standard. The construction adopted in *Genlyte* is more persuasive, in light of the authorities establishing that a permanent disability may occur before permanent and stationary status, and the Legislature's decision to use in section 4660(d) the broad phrase "indicating the existence of permanent disability," instead of specifying "permanent and stationary" status, as it has done in other statutes.

In support of its argument that the *Vera* rule is more consistent with legislative intent, Barrett also asserts that interpreting section 4660(d) to encompass medical reports that indicate permanent disability prior to permanent and stationary status would lead to uncertainty and increased litigation, and that any finding of permanent disability prior to permanent and stationary status is "largely premature and speculative." Barrett asserts this result would be inconsistent with the statement in section 4660(d) that "[t]he [2005] schedule shall promote consistency, uniformity, and objectivity." This general legislative statement of the goals to be promoted *by the new schedule* does not provide guidance as

to the interpretation of the portions of section 4660(d) that specify the standards for determining *which schedule applies*. In any event, as discussed above, statutory and case law establish that permanent disability *can* occur before permanent and stationary status. Accordingly, in an appropriate case, a physician may issue a report indicating the existence of permanent disability even though the employee is not yet permanent and stationary. (See *Zenith, supra,* 159 Cal.App.4th at pp. 497-498.) WCJs and the Board can assess relevant reports to determine whether they indicate the existence of permanent disability, just as they assess evidence in making other factual determinations. Barrett has made no showing that the need for such factual assessments has created, or will create, undue uncertainty in the application of section 4660(d).

Barrett's second argument is that applying the *Genlyte* standard in this case will result in relitigation of issues that have previously been decided. Barrett refers to the doctrine of "law of the case." That doctrine has no application here, because there has been no previous appellate court decision in this matter. (See *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491 [under doctrine of law of the case, an appellate court decision affects rights of " 'the same parties in any subsequent retrial or appeal *in the same case*' "], italics added.)

Finally, Barrett repeats in its supplemental brief its argument that there has been no change in the law because *Vera* has not been overruled; Barrett asserts that we should defer to the Board's determination on this point. As we conclude in part III.C., *ante*, there was a change in the law constituting good cause to reopen the WCJ's original decision, and we decline to defer to the Board's contrary determination. (See *Nicky Blair's, supra,* 109 Cal.App.3d at p. 956 [Board's determination of what constitutes good cause to reopen a decision under section 5803 may be accorded great weight, but is not conclusive]; accord, *Arias v. Workers' Comp. Appeals Bd., supra,* 146 Cal.App.3d at p. 821.)

In its amicus brief, City attacks the decisions in both *Genlyte* and *Vera*, but its arguments are not persuasive. City first contends the term permanent disability means permanent and stationary status except in the case of a progressive occupational disease.

City cites *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227 (*Western Growers*), in which the court stated: "A disability, other than one resulting from a progressive occupational disease, is permanent when the employee's condition has reached maximum improvement or the condition has become stationary for a reasonable period of time." (*Id.* at p. 235.) However, as discussed above, the terms "permanent disability" and "permanent and stationary" are not always used interchangeably; instead, in workers' compensation jurisprudence, permanent disability has historically included impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market. (*Genlyte, supra,* 158 Cal.App.4th at p. 724; see *State Compensation Ins. Fund v. Industrial Acc. Com., supra,* 59 Cal.2d at p. 52; *Luchini v. Workmen's Comp. App. Bd., supra,* 7 Cal.App.3d at p. 144.) And, the example of progressive occupational disease demonstrates a worker can have a permanent disability before his or her condition is permanent and stationary.

City next contends that even the *Vera* standard for a qualifying medical report (i.e., a report indicating permanent and stationary status) is not exacting enough. City argues a report should only qualify if (1) it indicates the worker's condition is permanent and stationary, and (2) the Board determines the worker is not also "partially or totally temporarily disabled on another part of the body." In support of adding this second requirement, City notes that the *Western Growers* court stated "[a] disability cannot be both permanent and temporary at the same time." (*Western Growers, supra,* 16 Cal.App.4th at p. 235.) Based on this general statement, City argues an applicant "cannot be permanently disabled if he is still temporarily disabled on any part of the body." City thus appears to argue that a report showing an applicant has a permanent and stationary injury still may not qualify as a report indicating the existence of permanent disability under section 4660(d), because the applicant may have a temporary disability on another part of the body. We reject this novel interpretation of section 4660(d), for which City has cited no applicable authority. City relies exclusively on general statements in the *Western Growers* case. *Western Growers* (which was decided in 1993, before the statutory amendments at issue in this case) involved a worker who suffered from major

recurrent depression; it did not address the hypothetical situation posited by City, i.e., a worker with different disabilities on different parts of the body. (See *Western Growers, supra,* at pp. 231.) In any event, for the reasons discussed above, we conclude the *Genlyte* standard is more appropriate than either the *Vera* standard or the standard proposed by City.

Finally, City argues the three exceptions to application of the 2005 PDRS specified in section 4660(d) should be construed as one exception with multiple requirements. City thus appears to contend the 2005 PDRS should apply unless (1) there is a qualifying medical report indicating the existence of permanent disability before January 1, 2005, *and* (2) the employer is required to send the section 4061 notice before January 1, 2005. We need not consider this argument, because the parties did not raise it.[11] (E.g., *Berg v. Traylor* (2007) 148 Cal.App.4th 809, 823, fn. 5 [courts generally do not consider arguments raised by amici if those arguments are not urged by the parties].) In any event, it is well-established that section 4660(d) includes three exceptions, any one of which can trigger application of the 1997 PDRS. (See *Zenith Ins. Co. v. Workers' Comp. Appeals Bd., supra,* 153 Cal.App.4th at p. 464; *Costco Wholesale Corp., supra,* 151 Cal.App.4th at p. 152.) City has presented no authority supporting its contrary contention.

For the foregoing reasons, we agree with the *Genlyte* and *Zenith* decisions that a qualifying medical report need not state that an employee is permanent and stationary to trigger application of the 1997 PDRS under section 4660(d). Instead, the report need only indicate that the employee has suffered a permanent impairment of earning capacity, a permanent impairment of the normal use of a body part, or a permanent competitive handicap in the open labor market.

2. Indication of Permanent Disability

The WCJ found that, under the *Genlyte* standard, Dr. Taylor's November 2004 report (particularly the statement that Avila-Gonzalez's range of motion had "plateaued")

[11] Indeed, Barrett explicitly states there are three exceptions in section 4660(d).

indicated the existence of permanent disability. In its opinion, the Board stated that Dr. Taylor's November 2004 report was "not an indication of permanent disability." In reaching that conclusion, the Board appeared to apply the *Vera* rule, i.e., that a qualifying medical report must indicate the worker's condition is permanent and stationary. The Board stated that Dr. Taylor's "statement that [Avila-Gonzalez] has plateaued 'at this point' cannot be used to boot-strap into a *permanent and stationary finding of permanent disability*." (Italics added.) The Board did not explicitly address whether Dr. Taylor's November 2004 report, or another qualifying report, indicated the existence of permanent disability under the *Genlyte* standard.

The Board, on remand, should make the necessary factual determination under that standard. As the *Genlyte* court noted, the Board "has extensive experience and expertise in interpreting and applying the workers' compensation laws and is charged with their administration." (*Genlyte, supra,* 158 Cal.App.4th at p. 724; accord, *Zenith, supra,* 159 Cal.App.4th at p. 499.) Accordingly, in *Genlyte*, *Zenith*, and *Lewis*, the courts remanded for the Board to determine whether a qualifying medical report, issued before January 1, 2005, was "substantial evidence 'indicating the existence of permanent disability' regarding [the applicant's injury], based on the entire record." (*Lewis, supra,* 168 Cal.App.4th at p. 700; accord, *Genlyte*, at p. 724; *Zenith, supra,* at p. 499.) Here, the Board should determine on remand whether Dr. Taylor's November 2004 report, or any other qualifying medical report, is substantial evidence "indicating the existence of permanent disability" regarding Avila-Gonzalez's August 2, 2004, injury, based on the entire record. (*Genlyte,* at p. 724; *Zenith,* at p. 499; *Lewis,* at p. 700.) If so, the 1997 PDRS will apply; if not, the 2005 PDRS will apply.

E. Determination of Permanent Disability After January 1, 2010

Avila-Gonzalez argues that, if his permanent disability rating is not determined until after January 1, 2010,[12] the 1997 PDRS should apply.

[12] In his petition, filed in October 2009, Avila-Gonzalez stated that his permanent disability rating had not yet been determined at the trial level, under either the 1997 PDRS or the 2005 PDRS.

As Avila-Gonzalez notes, section 4660, subdivision (c) (section 4660(c)) provides that the Administrative Director of the Division of Workers' Compensation shall amend the PDRS " 'at least once every five years.' " (§ 4660(c).) The 2005 PDRS took effect on January 1, 2005. (See Cal. Code Regs., tit. 8, § 9805.) Accordingly, under section 4660(c), the Administrative Director was to amend the 2005 PDRS by January 1, 2010. Apparently, no revised PDRS or amendments to the 2005 PDRS have yet been promulgated. Avila-Gonzalez contends that therefore the 2005 PDRS is now inoperative, and the 1997 PDRS should apply to the rating of Avila-Gonzalez's injury. Barrett counters that Avila-Gonzalez's argument is not ripe and was not presented to the WCJ or the Board.

Regardless of whether Avila-Gonzalez's argument is ripe or was presented to the Board, it is without merit. Although section 4660(c) provides that the Administrative Director shall amend the PDRS at least once every five years, the statute does not state that the 2005 PDRS shall become inoperative if no new PDRS is promulgated by January 1, 2010, and Avila-Gonzalez has cited no authority for that proposition.[13]

Moreover, as discussed above, section 4660(d) expressly specifies which schedule applies to injuries (such as Avila-Gonzalez's) that occurred before January 1, 2005. Section 4660(d) states that: (1) in general, the PDRS and any amendment or revision applies prospectively to injuries occurring on or after the effective date of the schedule, amendment, or revision; and (2) for injuries occurring before January 1, 2005, the 2005 PDRS governs unless one of the three statutory exceptions applies. (§ 4660(d).) There is

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[13] Avila-Gonzalez cites the Board's en banc decision in *Simi v. Sav-Max Foods, Inc.* (2005) 70 Cal. Comp. Cases 217 (*Simi*). In *Simi*, the Legislature had amended a statute to establish a new procedure for obtaining a medical-legal report for injuries occurring on or after January 1, 2005, but did not retain any procedure for obtaining such a report for earlier injuries. (*Simi*, at pp. 220-221.) The Board held that, because there was "*no operative law*" other than the former statute specifying a procedure for earlier injuries, the former statute continued to provide the procedure for those injuries. (*Id.* at p. 221, italics added.) Here, there is no basis for concluding that the 2005 PDRS has become inoperative; accordingly, there is no need to determine which law would apply if it had become inoperative.

no basis for applying the 1997 PDRS to applicants who do not fall within any of the statutory exceptions simply because their permanent disabilities were not *rated* until after January 1, 2010.

IV. DISPOSITION

The Board's decision is annulled. The case is remanded to the Board to apply the *Genlyte* standard and to determine whether Dr. Taylor's November 2004 report, or any other qualifying medical report, is substantial evidence "indicating the existence of permanent disability" regarding Avila-Gonzalez's August 2, 2004, injury, based on the entire record. If so, the Board should apply the 1997 PDRS; if not, the Board should apply the 2005 PDRS. The parties are to bear their own costs on appeal.

_____
Lambden, J.

We concur:

_____
Kline, P.J.

_____
Richman, J.